

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

SCOTT AND RHONDA BURNETT, RYAN
HENDRICKSON, JEROD BREIT, SCOTT
TRUPIANO, JEREMY KEEL, HOLLEE
ELLIS, and FRANCES HARVEY, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

THE NATIONAL ASSOCIATION OF
REALTORS, REALOGY HOLDINGS CORP.,
HOMESERVICES OF AMERICA, INC., BHH
AFFILIATES, LLC, RE/MAX LLC, and
KELLER WILLIAMS REALTY, INC.,

Defendants.

Case No. 4:19-cv-00332-SRB

CLASS ACTION

**DEFENDANTS' MOTION *IN LIMINE* NO. 6
TO EXCLUDE EVIDENCE OF UNRELATED LITIGATION**

Pursuant to Federal Rules of Evidence 401, 403, 404, and 801, the undersigned Defendants move to bar Plaintiffs from eliciting testimony about or otherwise referring to evidence of other lawsuits concerning the residential real estate industry.

ARGUMENT

Plaintiffs' experts have cited other litigation involving the real estate industry as evidence supporting Plaintiffs' claims. But those lawsuits involve different rules, different parties, different issues, or all three. They cannot help the jury understand the issues in this case and are inadmissible for that reason alone. Fed. R. Evid. 401, 403. To the extent Plaintiffs intend to use evidence of these lawsuits to show that any Defendant has violated the antitrust laws in the past,

that would be hearsay evidence inadmissible under Rule 801 and propensity evidence inadmissible under Rule 404(b).

A. The West Penn Multi-List Cases Are Irrelevant

Defendants' expert, Dr. Lawrence Wu, cited West Penn Multi-List ("WPML") as an example of an MLS in which listing brokers make offers of compensation to buyers without any rule requiring them to do so. *See* July 14, 2022 Expert Rept. of Lawrence Wu ¶¶ 164-167. Plaintiffs' expert responded to Dr. Wu's report by referring to two long-concluded lawsuits against WPML. *See* Aug. 10, 2022 Expert Reply Rept. of Craig T. Schulman ¶¶ 64-65. Plaintiffs might raise these lawsuits to attempt to rebut Dr. Wu's testimony in their cross-examination of Dr. Wu or in their direct examination of their own expert.

"Like all evidence," however, "rebuttal evidence must be relevant to be admissible." *United States v. Jean-Guerrier*, 666 F.3d 1087, 1092 (8th Cir. 2012); *see ABS Glob., Inc. v. Inguran, LLC*, No. 14-cv-503, 2016 WL 3996167, at *8 (W.D. Wis. July 22, 2016) (granting motion *in limine* to exclude previous litigation offered as antitrust rebuttal evidence). The WPML lawsuits are irrelevant to Defendants' economic analysis because they concerned home sellers' payment of *listing* broker commissions, not *buyer* broker commissions like those at issue here.

Both WPML lawsuits involved completely different parties and different rules. The rules at issue in those cases allegedly prevented listing agents from agreeing to "Exclusive Agency Listings," in which a homeowner reserves the right to sell their home "without assistance from a broker" and to pay the listing broker "a reduced commission or no commission when the property is sold." Decision and Order § I.(J.), *In re West Penn Multi-List, Inc.*, F.T.C. No. C-4247 (Feb. 13, 2009). The first suit ended in a consent decree with the FTC. *Id.* at 1. The second was a follow-on class action attacking the same rules. *See* Complaint ¶ 19, *Logue v. West Penn Multi-List, Inc.*,

No. 10-cv-451, Dkt. 1 (W.D. Pa. Apr. 6, 2010) (action resolved in 2011 settlement). Neither suit concerned the rules relating to the commissions sellers pay to buyer brokers.

B. The REX Litigation Is Irrelevant

Plaintiffs' experts and Plaintiffs' summary judgment papers also referred to litigation involving non-party REX, a discount real estate brokerage company that has no operations in Missouri. *See, e.g.*, Doc. 962 ¶19; May 6, 2022 Expert Rept. of Craig T. Schulman ¶92; May 6, 2022 Expert Rept. of Roger Alford ¶112). REX is the plaintiff in a Washington State suit challenging the so-called "No-Commingle Rule," which is not implicated here. *REX-Real Estate Exch. v. Zillow Inc.*, No. 21-cv-312, 2021 WL 2352043, at *1 (W.D. Wash. June 9, 2021). Thus, the REX litigation is irrelevant.

C. The Complaints Plaintiffs Seek To Introduce Are Irrelevant

Finally, Plaintiffs' exhibit list includes complaints filed in two additional lawsuits, *PLS.com, LLC v. Nat'l Ass'n of Realtors* (PX 2505) and *Christopher Moehrl, et al. v. Nat'l Ass'n of Realtors* (PX 2679). As with the WPML and REX suits, the fact that these complaints were filed is irrelevant. The plaintiffs in *PLS.com* challenge a policy, the "Clear Cooperation Policy," which is not implicated here. The plaintiffs in *Moehrl* are home **buyers**, not sellers.

CONCLUSION

Plaintiffs should be barred from eliciting testimony about or otherwise referring to evidence of unrelated, irrelevant litigation.

Dated: August 24, 2023

/s/ Robert D. MacGill

Robert D. MacGill, *pro hac vice*
Scott E. Murray, *pro hac vice*
Matthew T. Ciulla, *pro hac vice*
Patrick J. Sanders, *pro hac vice*
MACGILL PC
156 E. Market St.
Suite 1200
Indianapolis, IN 46204
(317) 721-1253
robert.macgill@macgilllaw.com
matthew.ciulla@macgilllaw.com
scott.murray@macgilllaw.com
patrick.sanders@macgilllaw.com

Jay N. Varon, *pro hac vice*
Jennifer M. Keas, *pro hac vice*
jvaron@foley.com
jkeas@foley.com
FOLEY & LARDNER LLP
3000 K Street NW, Suite 600
Washington, DC 20007
(202) 672-5300

Brian C. Fries
bfries@lathropgale.com
LATHROP GAGE LLP - KCMO
2345 Grand Avenue, Suite 2200
Kansas City, MO 64108-2618
(816) 292-2000

*Attorneys for HomeServices of America, Inc.,
BHH Affiliates, LLC, and HSF Affiliates, LLC*

/s/ David R. Buchanan

David R. Buchanan
dbuchanan@bjpc.com
BROWN & JAMES, PC-KCMO
2345 Grand Boulevard
Suite 2100
Kansas City, MO 64108
(816) 472-0800

Timothy Ray, *pro hac vice*
timothy.ray@hklaw.com
HOLLAND & KNIGHT LLP
150 North Riverside Plaza, Suite 2700
Chicago, IL 60606
(312) 263-3600

David C. Kully, *pro hac vice*
david.kully@hklaw.com
Anna P. Hayes, *pro hac vice*
anna.hayes@hklaw.com
HOLLAND & KNIGHT LLP
800 17th Street NW, Suite 1100
Washington, DC 20530
(202) 469-5415

Jennifer Lada, *pro hac vice*
jennifer.lada@hklaw.com
HOLLAND & KNIGHT LLP
31 West 52nd Street, 12th Floor
New York, NY 10019
(212) 513-3513

Dina W. McKenney, *pro hac vice*
dina.mckenney@hklaw.com
HOLLAND & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1757

Counsel for Keller Williams Realty, Inc.

/s/ Ethan Glass

Ethan Glass (*pro hac vice*)
Samantha Strauss (*pro hac vice*)
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004-2400
(202) 776-2244
eglass@cooley.com
sastrauss@cooley.com

Beatriz Mejia (*pro hac vice*)
COOLEY LLP
3 Embarcadero Center, 20th Floor
San Francisco, CA 94111
(415) 693-2000
mejiab@cooley.com

Charles W. Hatfield (MO Bar # 40363)
Alexander C. Barrett (MO Bar # 68695)
STINSON LLP
230 W. McCarty Street
Jefferson City, MO 65101
(573) 636-6263
chuck.hatfield@stinson.com
alexander.barrett@stinson.com

*Attorneys for Defendant NATIONAL
ASSOCIATION OF REALTORS®*

/s/ Jeffrey A. LeVee

Jeffrey A. LeVee (*Pro Hac Vice*)
jlevee@jonesday.com
Eric P. Enson (*Pro Hac Vice*)
epenson@jonesday.com
Kelly M. Watne (*Pro Hac Vice*)
kwatne@jonesday.com
JONES DAY
555 Flower St
Los Angeles, California 90071
Tel: (213) 489-3939
Fax: (213) 243-2539

Eddie Hasdoo (*Pro Hac Vice*)
ehasdoo@jonesday.com
JONES DAY
110 N Wacker Drive, Suite 4800
Chicago, Illinois 60606
Tel: (312) 782-3939
Fax: (312) 782-8585

Danne W. Webb (MO #39384)
Andrea S. McMurtry (MO#62495)
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Telephone: (816) 421-0700
Facsimile: (816) 421-0899
Email: dwebb@hab-law.com
Email: amcmurtry@hab-law.com

Counsel for Defendant RE/MAX, LLC

/s/ Steven F. Molo

Karrie Clinkinbeard
ARMSTRONG TEASDALE LLP-KCMO
2345 Grand Boulevard, Suite 1500
Kansas City, MO 64108
Telephone: (816) 221-3240
kclinkinbeard@atllp.com

Steven F. Molo, *pro hac vice*
Eugene A. Sokoloff, *pro hac vice*
Pamela I. Yaacoub, *pro hac vice*
Matthew J. Fisher, *pro hac vice*
MOLOLAMKEN LLP
300 N. LaSalle St., Suite 5350
Chicago, IL 60654
Telephone: (312) 450-6700
smolo@mololamken.com
esokoloff@mololamken.com
pyaacoub@mololamken.com
mfisher@mololamken.com

Lauren M. Weinstein, *pro hac vice*
Robert Y. Chen, *pro hac vice*
MOLOLAMKEN LLP
600 New Hampshire Ave., N.W., Suite 500
Washington, D.C. 20037
Telephone: (202) 556-2000
lweinstein@mololamken.com
rchen@mololamken.com

Justin M. Ellis, *pro hac vice*
MOLOLAMKEN LLP
430 Park Avenue, Floor 6
New York, NY 10022
Telephone: (212) 607-8160
jellis@mololamken.com

Stacey Anne Mahoney, *pro hac vice*
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
Telephone: (212) 309-6000
stacey.mahoney@morganlewis.com

Kenneth Michael Kliebard, *pro hac vice*
MORGAN LEWIS & BOCKIUS LLP
110 N. Wacker Drive, Suite 2800
Chicago, IL 60606-1511
Telephone: (312) 324-1000
kenneth.kliebard@morganlewis.com

William T. McEnroe, *pro hac vice*
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
Telephone: (215) 963-5000
william.mcenroe@morganlewis.com

*Counsel for Realogy Holdings Corp. (n/k/a
Anywhere Real Estate, Inc.)*